STATE OF MICHIGAN

COURT OF APPEALS

DEAN OUELETTE and DIANE OUELETTE,

Plaintiffs-Appellants,

v

GRAND MALL & OFFICE CENTER, INC.,

Defendant,

and

KROGER COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 30, 2009

No. 284514
Genesee Circuit Court
LC No. 06-084832-NO

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this premises liability and negligence action, plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of defendant Kroger Company.[1] We affirm.

This action arises out of the injuries plaintiff Dean Ouellette sustained when he fell from his bicycle after hitting a hole in a grassy area adjacent to defendant's parking lot. Plaintiff was riding his bicycle in the City of Grand Blanc when he left the sidewalk and rode across the grass to access defendant's parking lot. Plaintiff's front tire went into a French drain hole in the grass, causing him to be thrown from his bicycle and sustain injuries. Plaintiff admitted seeing the hole before he hit it, but claimed it was unavoidable. According to Randall D. Byrne, city manager for Grand Blanc, the French drain was probably in the road right-of-way, and belonged to the city. Defendant's parking lot was adjacent to the right-of-way and defendant mowed the grass in that area.

[1] Defendant Grand Mall & Office Center, Inc. is not a party to this appeal.

Plaintiffs argue that the trial court erred by finding their premises liability claim was barred by the open and obvious danger doctrine. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005). Viewing the documentary evidence submitted by the parties in a light most favorable to the non-moving party, summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Motions under MCR 2.116(C)(8) are proper if the nonmoving party "has failed to state a claim on which relief can be granted." Such claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (citation omitted). In reviewing a (C)(8) motion, the "factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*.

Premises liability, which is the basis for plaintiffs' first claim against defendant, "is conditioned upon the presence of both possession and control over the land." *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). The duty that an owner or occupier of land owes to a visitor depends on the status of the visitor at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "An 'invitee' is 'a person who enters upon the land of another upon an invitation that carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitees] reception.'" *Stitt*, *supra* at 596-597 (citation omitted). Generally, an invitor owes a duty to his invitees "to exercise reasonable care to protect them [from] an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitor's liability must arise from active negligence, through an unreasonable act or omission, or through a condition of which the invitor knew, or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgmt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). This duty does not extend to conditions from which an unreasonable risk can be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Ghaffari v Turner Constr Co*, 473 Mich 16, 21; 699 NW2d 687 (2005); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). An invitor must warn of hidden defects, but is not required to protect against or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Ghaffari*, *supra* at 21-22; *Riddle v McLouth Steel Products*, 440 Mich 85, 90-94; 485 NW2d 676 (1992); *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). Regardless of a duty to warn, an invitor still has "a duty to protect . . . against foreseeably dangerous conditions." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

Whether a danger is open and obvious depends upon whether "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008) (citation omitted). That a danger was open and obvious is not relevant to a claim based in ordinary negligence. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). Plaintiff chose to cut through the grassy area instead of remaining on the sidewalk to enter the parking lot. Plaintiff admitted that he saw the hole approximately two feet before his front wheel went into it.

The fact that he was unable to avoid the hole does not negate the fact that he saw it. As such, the trial court properly determined the hole comprised an open and obvious danger.

Plaintiff asserts that even if the hole was open and obvious, there was a question of fact whether special aspects of the danger existed, which supported his premises liability claim. In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition that is unavoidable or that poses an unreasonably high risk of severe injury. *Lugo*, *supra* at 516-518. Any danger created by the drain hole was clearly avoidable. Plaintiff elected to cut through the grassy area separating the sidewalk and the parking lot, rather than continuing on the sidewalk to the regular entrance to defendant's parking lot. In addition, the hole created by the drain did not pose an "unreasonably high risk of severe injury." *Lugo*, *supra* at 518, 520. Accordingly, the trial properly granted defendant's motion for summary disposition on this claim.

Plaintiff next contends that the trial court erred by dismissing his claim of simple negligence. A common law claim of negligence requires: (1) the existence of a duty, (2) breach of that duty, (3) causation, and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). "Whether a defendant owes a duty to a plaintiff to avoid negligent conduct is a question of law that is reviewed de novo." *In re Certified Question from the 14th Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

A defendant may be liable for injuries occurring on adjacent public land if the defendant increased the hazards of the adjoining property, created new hazards, or "had a servitude for his private benefit . . . the enjoyments of which affected the area's safety." *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 132; 463 NW2d 442 (1990). The French drain diverts water from the grassy area to a steel culvert that crosses Bella Vista Drive and into a storm sewer that runs along Saginaw Street. Byrne, the manager for the city of Grand Blanc, believed the road right-of-way belonged to the city. It is presumed that landowners of property abutting a street own fee title to the property out to the center of the street, subject to the public right-of-way easement. *Thies v Howland*, 424 Mich 282, 291; 380 NW2d 463 (1985). "The owner of the fee subject to an easement may reasonably use the land for any purpose not inconsistent with the easement owner's rights." *Morrow v Boldt*, 203 Mich App 324, 329-330; 512 NW2d 83 (1994). However, the easement owner, not the owner of the fee subject to the easement, has the duty to maintain the easement in a safe condition to prevent injuries to third parties. *Id*.

Defendant did not control or possess the property by mowing and maintaining the grass in the right-of-way that abuts its property. However, if a landowner physically intrudes into abutting property or commits an act that creates a new hazard or increases an existing hazard, the landowner may be liable for injuries sustained on the property. *Stevens v Drekich,* 178 Mich App 273, 277; 443 NW2d 401 (1989). One who volunteers to perform an act assumes a duty to perform it carefully in a manner consistent with a reasonably prudent person. *Terrell v LBJ Electronics*, 188 Mich App 717, 721; 470 NW2d 98 (1991). The pleadings fail to support a finding that defendant's mowing of the grass increased the existing hazard or created a new one, and did not alter the depth and location of the drain. In fact, it would have been more difficult to see the drain if the area had been left unmowed. Accordingly, defendant did not owe a duty to plaintiff and the trial court properly granted summary disposition in favor of defendant on plaintiff's negligence claim.

Finally, plaintiff claims the trial court's grant of summary disposition was premature because it never decided the issue of who possessed and controlled the area where the drain hole was located. A claim based on premises liability is conditioned on the presence of both possession and control over the premises. *Kubczak, supra* at 660. Title to the property is not necessary. Instead, liability depends on actual possession and control. *Id.* at 662. Thus, plaintiff is correct that the trial court should have decided the issue of possession and control before analyzing the premises liability claim.

However, this error does not require reversal because summary disposition was appropriate, because plaintiff's claims cannot be sustained under any of the theories presented. If defendant did possess and control the premises where the drain is located, then plaintiff's claim was properly brought under a theory of premises liability but is barred by the open and obvious danger doctrine. In the alternative, if defendant did not control and possess the relevant area, plaintiff's claim was properly brought under a theory of simple negligence, which must also fail based on the absence of any duty owed by defendant to plaintiff.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra